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MAR 24 1903
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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

EUGENE C. GORDON
vs.
ARTHUR E. RANDLE.
No. 229.

BRIEF FOR DEFENDANT IN ERROR.

J. J. DARLINGTON,
Attorney for Defendant in Error.

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EUGENE C. GORDON,
vs.
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STATEMENT OF FACTS.

This cause is before this Court upon a writ of error from an order of the Court of Appeals of the District of Columbia denying a petition for a writ of mandamus against Andrew C. Bradley, late an associate justice of the Supreme Court of the District of Columbia, to require him to settle a bill of exceptions upon the following state of facts:

In an action upon a promissory note brought by the plaintiff in error against the defendant in error in the Supreme Court of the District of Columbia, a verdict in favor of the latter was rendered on the 16th day of November, 1900, upon which verdict judgment for the defendant was thereafter duly entered.

The terms of the Circuit Court branch of the Supreme Court of the District of Columbia, in which branch the trial was had, are fixed by Rule 3, of that Court, and commenced on the first Tuesday of January, the first Tuesday of April and the first Tuesday of October; so that the trial of the

case was held at the October, 1900, Term, terminating, under the rule, on the day preceding the first Tuesday in January, or with the 31st day of December. Tuesday of the year 1901 occurring on New Year's Day.

No steps in the nature of an appeal from the judgment were taken during the October Term, except the praying of an appeal to the Court of Appeals on the day that the judgment was rendered, and an order of the Court allowing the plaintiff to deposit $50 in lieu of an appeal bond. The provision governing the settlement of bills of exceptions in that Court is Rule 54, Sec. 2, which is as follows: "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than 38 days exclusive of Sundays, save in a case begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term, in his discretion, in order to prepare a bill of exceptions."

In cases in which application to extend the term for the purpose in question is made, it is the practice, as shown at page 12 of the Record, for the Court to direct an entry on its minutes on the last day of the term, specifying the cases in which such application has been made, and prolonging the term for 30 days in those cases. In the case now before the Court, however, no application to extend was made during the term, nor until the 7th day of January, 1901, a week after the term had expired, which application was overruled by the Court on the ground that the October Term, at which the trial was held, had ended on the 31st day of December, 1900. Record, page 11. No bill of exceptions was presented to opposing counsel until January 17th, 1901, nor to the Court until January 28th, 1901, on which last mentioned date the trial justice declined to settle the bill, for the reason that the October Term had not been prolonged for the purpose, the bill as presented, moreover, being one upon which counsel had not agreed. (Record, pp. 9-10.)

Thereupon, on February 23rd, 1901, the plaintiff in error applied to the Court of Appeals for a writ of mandamus requiring Andrew C. Bradley, the trial justice, to settle the bill of exceptions, claiming that, as the first Tuesday of Jan-

uary, 1901, was New Year's Day, it was a legal holiday, and that the first Tuesday in January, therefore, was the 8th day of that month. The petition was set for argument March 12, 1901, and was on that date dismissed by the Court of Appeals; whereupon the plaintiff sued out a writ of error to this Court, under which he caused the defendant in the action at law in the lower court to be cited, there being no citation, service or notice to the trial justice, against whom alone the petition for mandamus was directed.

Mr. Justice Bradley died on the 15th day of May, 1902, a suggestion of which fact would ordinarily terminate a proceeding in mandamus. As the present appeal, however, is prosecuted in this Court, not against the officer whom it is sought to compel to do the required act, but against the defendant in the action at law in the Supreme Court of the District of Columbia, and notwithstanding the fact that the latter was not a party to the proceeding in the Court of Appeals here appealed from, the suggestion of death has not been more formally made.

POINTS AND AUTHORITIES.

That the action of the Court of Appeals in denying the petition was proper, will appear upon the following considerations:

I.

There was no record before the Court, complying with its rules; a transcript of only such parts of the record as the attorney for the complainant in error saw fit to designate being presented, as will appear from the order of the attorney at page 10 of the Record, and the certificate of the clerk of the Supreme Court of the District of Columbia at page 11. It is true that Rule V., Sec. *g*, of the Court of Appeals permits the attorney for the plaintiff in error to designate the parts of the record which he considers sufficient to be included in the transcript for determination of the questions to be presented on appeal, provided he serves a copy of such designation upon the opposing counsel, who may thereupon designate such further parts of the record

as he may deem necessary or material for the purposes of the appeal; but no such course was pursued or notice given in the case at bar.

II.

In the second place, as is apparent from the Record, the object of the petition for mandamus was to secure a reversal by the Court of Appeals of a judicial determination by the Court below of a question of law, namely, the question when the October Term of the Supreme Court of the District of Columbia ends, under its rules, when the first Tuesday of the following January happens to fall upon a legal holiday. That this was a question of law, and one which the Court below was not only authorized, but was necessarily required by the facts and circumstances of this case to pass upon, is apparent upon the face of the petition; and that mandamus never lies to reverse the judgment of a Court under such circumstances is well settled. Ex parte Taylor, 14 How. pp. 12–13; ex parte William Many, 14 How. 24–5.

III.

In the third place, it is to be observed that the petition was not based wholly, if at all, upon the refusal of the trial Court to settle the bill of exceptions on the 20th day of January, 1901, when it was presented to him for settlement, but was brought to reverse his action of the 7th day of January, 1901, in refusing to continue the October Term for that purpose. He clearly was without power, on the 20th day of January, to settle the bill, unless the former term had been prolonged for that purpose; and the error assigned in the petition is that the application to continue made on the 7th day of January was in time, on the theory that, the first Tuesday in January being a legal holiday, the January Term of the Circuit Court began on the second Tuesday. But the power to prolong was, in any event, discretionary under the terms of Rule 24, and for this reason, also, is not the subject of coercion or compulsion by mandamus.

That the authorities cited in the opposing brief to the effect that a power given to public officers, though by language indicating a discretion upon their part, is compulsory, and may be called into exercise by mandamus where necessary to *de jure* rights of third persons, are not applicable to the exercise of a discretion judicial in its nature, they themselves expressly declare. Supervisors *vs.* United States, 4 Wallace, p. 447 and citations.

IV.

In the fourth place, the ruling of the trial justice was unquestionably correct. The first Tuesday of Jannary, 1901, was, it is true, the first day of January, and, under the provisions of Sec. 992, of the Revised Statutes of the District of Columbia, then in force, that day, as, also, the 4th day of July, the 25th day of December, Inauguration Day, the 30th day of May, and such days as might be appointed or recommended by the President as a time of public fast or thanksgiving, to which the 22d day of February has since been added, were made "holidays within the District, and shall, for all purposes of presenting for payment or acceptance, for the maturity and protest, and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, or other negotiable or commercial paper, be treated and considered as is the first day of the week, commonly called Sunday, and all notes, drafts, checks, or other commercial or negotiable paper falling due or maturing on either of said holidays shall be deemed as having matured on the day previous." But there is neither any precedent nor principle upon which the fact that the day designated by the rules of the Court for the commencement of the January Term happened to fall upon Sunday, or upon a holiday made by statute the equivalent of Sunday, can be held to have extended the preceding term for a week. If the analogy of the provisions of the statute referred to in regard to commercial paper, which seems to have been the subject principally contemplated by it, is to be followed, then the only effect of such a holiday is to make the preceding day the commencement of the new term; while, if the analo-

gies of the common law govern, the only effect, according to the most favorable authorities, would be to make the new term commence on the day following.

But, it is submitted, the fact that the first day of the new term fell upon a legal holiday had no effect whatever upon the commencement of that term. It still began on the first Tuesday of January, although for many purposes that day in the year 1901 was *dies non juridicus*. Had the first Tuesday in January fallen upon a juridicial day, the old term, under the rule, unquestionably would have ended with the day preceding; and, this being so, there can be nothing in the fact that the first Tuesday was *dies non* which could extend the old term beyond such preceding day.

Verdicts may be received on Sunday (Reid *vs.* State, 53 Ala., 402; Henderson *vs.* Reynolds, 84 Ga., 159 and citations; Webber *vs.* Merrill, 34 N H., 202; Stone *vs.* Bird, 16 Kans., 488; State *vs.* Penley, 107 N. Car., 808; Hiller *vs.* English, 4th Strobh, 486), and the jury may be further instructed, and any orders or motions incidental to receiving the verdict may be made (Jones *vs.* Johnson, 61 Ind., 257; McCorkle *vs.* State, 14 Ind., 39, 43; People *vs.* Odell, 1st Dak., 197). Recognizances (State *vs.* Douglass, 69 Ind., 544; Johnston *vs.* People, 31 Ill., 469) and bail may be taken (Watts *vs.* Commonwealth, 5 Bush, 309; Hammons *vs.* State, 59 Ala., 16; Weldon *vs.* Colquitt, 62 Ga., 449); and even injunctions may issue on that day, in cases of necessity (Langalier *vs.* R. R. Co., 64 Ill., 247). It is impossible, therefore, to maintain that the mere commencement of a term cannot date from that day, or from a holiday placed upon the same footing with Sunday.

If any term of the Court should be made by its rules to commence on the last Tuesday in February, for example, and in any year that day should happen to fall on the 22d day of that month, which is now made a legal holiday, no term of the Court would be possible for a year, under the construction upon which the contention of the plaintiff in error rests.

V.

In the fifth place, in the absence of special circumstances,

not arising from any fault or omission upon the part of the exceptant, the trial Court is without power to settle or sign a bill of exceptions after the end of the term, unless, during the term, it has been continued for the purpose. Dredge *vs.* Forsythe, 2d Black, 563; *In re* Wright 134 U. S., 136; Muhler *vs.* Ehlers, 91 U. S., 250; Bank *vs.* Eldred, 143 U. S., 293, 298; Brown *vs.* Bradley, 6 D. C., App., 207; Coe *vs.* Morgan, 13 Fed. Rep., 844, *note* and citations; Western Dredging Co., *vs.* Heldmaier, 116 Fed. Rep., 179.

The rules of Court are a law to the Court as well as to the suitors, so long as they remain in force (Johnson *vs.* Wright, 2 D. C., App., p. 220), and cannot be dispensed with to meet the supposed hardships of particular cases (Talty *vs.* District of Columbia, 30 Wash. Law Reporter, 774). Certainly the present case is the first instance of an attempt to compel the Court by mandamus to dispense with or disregard them.

VI.

In the sixth place, it is so obvious that the present writ of error must fail for want of proper parties, that it is, perhaps, improper to consume the time of the Court by the discussion of any other point in the case. The proceeding below was a petition by mandamus, complaining of no act or conduct of the present defendant in error, seeking no relief as against him, and to which he was not even made a party. To the present writ of error, which is simply and only an appeal from the decision of the Court of Appeals upon that application, the defendant in error, and he alone, is cited. This Court would seem to have no alternative but to dismiss the case upon its own motion.

Respectfully submitted,

J. J. DARLINGTON,

Attorney for Defendant in Error.